

RECENT REFORMS TO VICTIM RIGHTS AND THE EMERGING 'NEW CRIMINAL TRIAL'

Tyrone Kirchengast¹

ABSTRACT

The victim of crime has emerged as a site of activity in modern criminal law. The recent focus on victim rights in both the Australian and international context has been said to derogate from the rights of the accused in the trial process. In Australian law, this derogation takes the form of the modification of key rights assigned to the accused at common law and by statute. These rights include the right to a fair trial, and where if convicted, the right to be sentenced on the basis of an objective reflection of the seriousness of the offence and offender. Modification of these rights in certain circumstances have led some to argue that the fundamental rights of the accused, tantamount to what we identify as constituting the modern criminal trial process, have been abrogated to allow for the appeasement of sectarian interests in the attempt to bring otherwise marginalised groups back into the criminal justice system. By reference to the contentious use of victim impact statements in the sentencing of homicide offenders, this paper will discuss whether such changes actually erode the rights of defendants or merely reposition the victim as relevant to the determination of criminal culpability and offence seriousness. A discussion of whether this change fundamentally challenges the trial process as a means of determining offence seriousness will follow.

INTRODUCTION

This paper seeks to do two things. First, it traces the recent debate that the criminal trial is 'under attack' due to the modification of defendant rights and privileges at common law and by statute as advanced by Duff, Farmer, Marshall and Tadros (2007). This paper assesses the extent to which this suggestion is based on the view that the trial is an institution manifestly concerned with defendant rights over all other agents of justice, including the victim. This leads to the second purpose of this paper, that the integration of victim rights in homicide proceedings shows that the trial is not 'under attack', but is rather functioning as it is meant to. That is, the criminal trial is an institution through which various interests, including those of the defendant and victim, come to be weighted and valued.

Victim rights challenge the modern criminal law and justice system in significant ways. This is largely due to the way such rights are seen to derogate from the rights of the accused in the trial process. In the Australian context, this derogation takes the form of the modification of key rights assigned to the accused at common law. These rights include the duty to accord a person accused of an offence a full measure of justice by extending to that person a right to a fair trial. The right to a fair trial has traditionally been assured by various institutions of criminal justice, specifically trial by jury, where the accused has access to counsel and full disclosure of the Crown case, and where, if convicted, is sentenced on the basis of an objective reflection of the seriousness of the offence and offender. Modification of these rights in certain

circumstances has led some to argue that the fundamental rights of the accused, tantamount to what we identify as constituting the modern criminal trial process, have been challenged by the introduction of sectarian and state interests in the attempt to bring otherwise marginalised groups back into the criminal justice system, or otherwise by the need to reposition defendant rights against the state's need to ensure security from those seeking to advocate gross civil unrest, including public disorder such as riot or acts of terrorism.

In the context of the growing recognition of victim rights within the criminal law, arguments have emerged that suggest the criminal trial is now taking a new form through the consideration of sectarian interests. It is claimed that this new form departs from a notion of the criminal trial as defendant focussed and as such undermines the true function of the trial: a forum through which criminal accusations can be tested by the application of rules and procedures that seek to establish the 'truth' of the matter. This new form is said to be dictated by the need to balance interests that would otherwise be restrained by the common law right to a fair trial, where the focus is squarely on the maintenance of defendant rights through a proper testing of evidence that is not unfairly prejudiced by reference to emotive content from the victim, including harms that may well be peripheral to liability. Parliament's ability to modify criminal law and procedure has meant that in light of political pressure to ensure a balancing of interests within the criminal justice system, that a new, potentially less fair, criminal trial experience is emerging for various defendants.

This paper, in the context of victim rights in sentencing, will explore the extent to which Duff's et. al. (2007) argument characterises a trial that is bound by certain normative assumptions that value the trial as exclusive, rather than inclusive, and thus privilege the trial beyond the reach of social and political change. This paper will examine, in light of victim rights in sentencing, whether the trial is indeed taking on an essential new form that puts defendant rights at stake. To the contrary, this paper will assess whether the criminal trial is rather doing what it always has done – balance the competing interests of various stakeholder groups, including those of the defendant, state and victim. By reference to the use of victim impact statements in homicide cases, this paper will demonstrate how the positioning of victim rights alongside those of the accused indicate how the trial may be viewed as an inclusive forum through which various perspectives and interests come to be valued. Importantly, this challenges the notion that the criminal trial is not taking some new form against the interest of defendants and perhaps calls into question the need to rethink our notion of the criminal trial in the first instance.

IS THE CRIMINAL TRIAL 'UNDER ATTACK'?

In their defence of the criminal trial, Duff et al. (2007) suggest that numerous interests are now being integrated into the criminal trial such that the traditional rights afforded to defendants are being eroded. Their argument is that the normative boundaries of the trial are being shifted to incorporate various sectarian interests, as well as those of the state, such that the modern criminal trial is "under attack" (Duff et al., 2007: 1). The trial is under attack because, as they argue, the trial is the means by which defendant rights are assured against unfair accusations, processes and sanctions that threaten the liberty of the individual in significant ways. The conception of the trial which is

proffered is thus narrowly construed in terms of the instrumental value of the trial in the establishing of the truth of the criminal accusation:

Trials are thus of purely instrumental value: they serve the more fundamental interest that the state has in establishing whom we can justly punish for their crimes. Let us call this the standard account. Even on this account, other values serve at least to restrain the main aim of the trial. Defendants have various rights which must be protected, partly in order to ensure that accurate verdicts are sought with a proper degree of respect for the defendant as citizen. (Duff et al., 2007: 5)

Thus to erode defendant rights, even out of efforts to support vulnerable groups such as victims of crime, is to compromise the very function and purpose of the trial in the first place. Even where the attempt to reposition interests is universally supported as commendable, the trial, being manifestly concerned with interests of the defendant, means that it is not the proper place to redress such issues. As such, Duff et al. (2007: 214) provide that Duff et al. (2007) further argue that this attack on the trial can be responded to by offering a normative theory of the trial which seeks to reposition the trial as the means by which defendant rights are protected *a priori*. Despite recognising that the trial involves a communicative process between participants, their normative perspective significantly privileges the defendant:

The core of that theory is the idea of calling into account: the criminal trial, we argue, is a process through which defendants are called to answer a charge of criminal wrongdoing and, if they are proved to have committed the offence charged, to answer for their conduct... The trial is a communicative forum which involves mutual recognition of responsibility between participants. (Duff et al., 2007: 3)

This normative theory seems to hold much hope for victims until the scope of this communicative process is fully explored. Duff et al. (2007: 214) argue that the victim need not be recognised as an actual participant as the criminal trial, as the trial, being a public enquiry, is always concerned with the interest of the victim. This is because the harm occasioned to the victim is central to the public interest. Importantly, it is for the prosecution to liaise with the victim and to represent their interest in court as a matter of public concern. It is this interpretation of the role of the victim, as significant only to the extent interpreted by the prosecutor in the public interest, which will be considered in this paper. This is where the role of victim impact statements becomes significant, given the controversies over the consideration of victim perspectives in sentencing, and these are read as an affront to fundamental defendant rights and interests. Moreover, it is this reasoning which has led, at least in NSW, to the continued exclusion of victim impact statements submitted by family members of homicide victims (*R v Previtera* (1997) 94 A Crim R 76 at 86).

THE SIGNIFICANCE OF THE VICTIM IN THE HISTORY OF THE CRIMINAL TRIAL

It is far beyond the scope of this paper to present the history of the trial and my treatment must be selective. The history of the trial is significant as it shows how the trial has been forged out discursive processes that include, rather than exclude, public and private debate. Historically, the victim has been central to the formation of the criminal trial and to institutions of criminal justice, such as policing and prosecutions (Kirchengast, 2006; Doak, 2008). The assize trials of the twelfth and thirteenth centuries indicate just how central victims were. Even after the assent of the Assize of

Clarendon and Northampton in 1166 and 1176 respectively, Acts which sought to formalise prosecution procedure by presentment before the King's Royal Justices, the victim remained central. Prosecution procedure prior to the Assize of Clarendon involved the ordeal or trial by combat. The Assizes of 1166 and 1176 encouraged the development of a trial process by presentment of indictment before a jury called from the county in which the alleged offences were committed. Originally the grand jury was only ordered to present the indictment, but this soon extended to the determination of liability, particularly after the ordeal was outlawed in 1215.

The Assize of 1166 thus set into motion the transformation of the criminal trial from one that deciding the prevailing party by ordeal or by battle to one based on an evidentiary model, in which evidence was considered by laypersons. Although the Assizes of 1166 and 1176 supported trial by ordeal, the result of the ordeal, banishment where passed and execution if failed, was deemed to be a rigorous means of determining guilt. Further, by being called into question by the presenting jury in the first instance, the offender was to be punished, in one way or another. This opened up the basis for the jury as the means by which evidence was tested against an accusation.

What is important is that during this process, which significantly established trial procedure at the hands of the Crown, much as it stands today, was that the victim remained central. Indeed, without the victim bringing the accusation in the first instance, and then agreeing to act as prosecutor, most offences would not have been reported nor prosecuted (Klerman, 2001). This was observed by Blackstone (1783, 4: 311):

[O]n an indictment, which is at the suit of the King, the King may pardon and remit the execution; on an appeal, which is at the suit of a private subject... the King can no more pardon it than he can remit the damages recovered in an action of battery.

Indeed Duff et. al. (2007: 22) make plain the fact that the ordeal declined after 1215 not only out of the questionable result of trial by fire or water, but also due to the fact that the ordeal was best suited to doing justice in small communities where the individual accused, supporting witnesses, and judge, would likely know one another. Hyam (1981) notes that the result of the ordeal would be interpreted consistent with whatever opinion had already been formed as to the guilt of the accused. Clearly, whether an accused sank, or was able to withstand the pain of fire or the hot irons, had little to do with actual guilt as we come to define it today. As the legitimacy of the ordeal was based on communal knowledge of the offence and offender, the tenacity of such a model of proof fell into question when the accused was to be presented before the grand jury, and King's Royal Justices on circuit from Westminster, who would have had a less intimate knowledge of the offence and offender.

Throughout this transformation, however, the victim remained central. Whether in Westminster or at Assize in the counties of England, the victim was the principal party responsible for the administration of justice. Along with the King's sheriffs responsible for the calling of the presenting jury on Assize, the victim would assist in the apprehension of the felon, perhaps keeping them imprisoned to allow the sheriff to bring them before the Assize, so that the victim could then bring the information before the King's Justices to initiate the prosecution. It was only after the King gained the administrative capacity to continue prosecutions without the assistance of the

victim, should the victim refuse to bring an information initiating proceedings in the first instance or withdraw the information after a private settlement with the offender, that the victim was relegated to lesser some standing in the trial (Kirchengast, 2006: 39-41).

Duff et al. (2007: 29) indicate that the origins of the altercation trial of circa 1400-1700, the term being borrowed from Langbein (2003), indicate the development of a tribunal in which the court was concerned with the weighing up of evidence and arguments. This saw the beginning of an era in which the criminal trial could be seen to 'act judicially'. This era, however, came to be seen as one in which the defendant was denied of rights now deemed fundamental to the constitution of the trial in the first instance. The mode of evidence was largely based on confrontation and the prisoner was denied a copy of the indictment until he or she reached court. The accused was also compelled to speak to answer the accusation, and the jury was increasingly drawn from a wider area than the county in which the offence occurred. The accused could test the evidence of the witnesses, but could not call sworn witnesses until 1702. While this period evidenced many deficiencies of fair trial procedure as we know it today, it does indicate the slow and gradual emergence of the key values that characterise the latter period of the trial from circa 1700, the adversarial trial. The period from 1400 thus evidenced the gravitation to the value of 'truth' as a means of determining the guilt of the accused. Throughout this period, the victim still actively prosecuted the offender, especially in circuit at Assize, away from the Crown officers who mainly worked in London.

The era of the adversarial trial presented the normative constraints on trial process that characterise the criminal trial today. The development of a legal profession led to the development of a more adversarial trial experience, despite the defendant being granted bail or provided a copy of the indictment to best prepare a defence against the prosecution case. Most notably during this period, the role of the victim as necessary to the policing and prosecution process declined following the rise of an organised police force from 1829 in London, and soon thereafter in the counties, and the rise of a Director of Public Prosecutions in the later nineteenth century. Prior to that, Crown officers prosecuted notable cases as indicated by the range of cases reported in the Old Bailey from 1674.

THE INFLUENCE OF VICTIM RIGHTS IN HOMICIDE PROCEEDINGS

This paper now turns to consider the period in which state institutions of the police and public prosecutions have largely replaced the victim as an active constituent of criminal justice, at least in the court room. It is in the context of the removal of the victim from criminal law and justice that, since the 1970s, various groups have criticised the power of the state as monopolising the justice system to the exclusion of private or sectarian interests. The victim rights movement, for example, specifically sought to criticise the removal of the victim from the criminal justice process. Victims became critical of the way they were silenced following an offence, removed from the policing, prosecution and punishment process. Seeking ways in which this removal could be practically redressed, victims formed grassroots movements to lobby government in support of greater victim's services, such as state based compensation. Since the 1970's, each common law jurisdiction has responded to the needs of victims

by offering compensation and other modes of support to help satisfy the medical, emotional and financial needs of victims following an offence. The need for redress, however, has now gone beyond the development of support services peripheral to the criminal trial.

Victim rights have been inserted into the law in three distinct ways. Most jurisdictions now offer a charter or declaration of victim rights detailing the rights and obligations of government agencies in their treatment of victims; modes of criminal injuries compensation which provides standard amounts of compensation for prescribed injuries flowing from an alleged criminal offence; and the ability to adduce into sentencing proceedings a victim impact statement to detail the harms occasioned as a result of the offence, after conviction but before sentencing. While debate ensues as to the extent to which a charter of rights and compensation appropriately restores the victim following an offence (Mawby, 2007: 209-239), the tenure of victim impact statements in sentencing proceedings remains the most contentious. While the use of such statements remains controversial throughout the common law world, it is in NSW where the judiciary has assumed greatest resistance to their use in sentencing, particularly in homicide matters. The arguments for or against such resistance will be canvassed in light of a growing national and international movement toward the encouragement of victim participation in sentencing.

In the context of the above discussion on the modification of defendant rights, and the formation of trial process, the use of victim rights in sentencing in NSW homicide cases, when compared to that of the common law world, indicates something quite significant about the criminal trial. Arguably, a comparative analysis of the NSW situation against the reforms adopted elsewhere reveals just how manoeuvrable the substantive basis of sentencing doctrine is when it comes to including new perspectives and agents of justice. This indicates how the trial, including the sentencing phase, is potentially inclusive, rather than exclusive to the benefit of the interests of the defendant. This could be seen to be the very basis of sentencing doctrine at least in terms of the rule that sentences be objectively proportionate to the harms occasioned to all parties, including victims and society: *R v Veen [No 1]* (1979) 143 CLR 458 and *R v Veen [No 2]* (1988) 164 CLR 465. The following discussion indicates how the exclusion of victim impact statements in NSW homicide cases may be tempered by other perspectives that seek to include family victims as relevant to sentence.

The NSW Situation

Since their inception into NSW law under the *Victim Rights Act 1996* (NSW), victim impact statements have provided victims of crime increased opportunity to participate in the sentencing process.² Prescribed under s 28 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), both primary and family victims have the ability to tender an impact statement following conviction.³ Family statements may be tendered where the primary victim dies following an offence. A sentencing judge will generally consider the impacts of an offence through the information tendered in evidence, usually at trial. Recognition of the impacts of an offence upon the victim is a long serving rationale of punishment that is specifically relevant to the formation of an appropriate sentence. It is out of the need to constitute such impacts objectively,

however, that victim impact statements have tended to be poorly received by sentencing courts. This is because such statements are not always seen to be consistent with the established doctrines of punishment that require a sentence to be objectively proportionate to all circumstances of the offence and offender (Kirchengast, 2005).

Due to the principle that punishment be objectively proportionate to the assessment of the harm occasioned, *R v Previtara* (1997) 94 A Crim R 76 rules that sentencing courts must exclude any consideration of family impact statements where the primary victim dies. This is because, as Hunt CJ at CL states, death is the ultimate harm, such that a sentencing court must not, by reference to a family victim impact statement, 'value one life as greater than another' (*R v Previtara* (1997) 94 A Crim R 76 at 86). This, as indicated below, emphasises the need to consider the death of the primary victim in terms of the immediate circumstances of the offence. It is thus reasoned that no opinion on the victim, from family members or others, be allowed to influence the assessment of harm unless that opinion is specifically relevant to the immediate circumstances of an offence. Considering such perspectives on the loss of the victim would, under *Previtera*, allow the possibility that the primary victim was more valued than another. *Previtera* thus supports the sentencing principle that all life is of equal value. Hunt CJ at CL indicates this in the following terms:

A problem arises, however, in those cases – such as the present – where the crime involves the death of the victim. The consequences of the crime upon the victim (death) has already been proved (or admitted) by the time the offender comes to be sentenced...

The law already recognises, without specific evidence, the value which the community places upon human life... (*R v Previtara* (1997) 94 A Crim R 76 at 86)

Hunt CJ at CL indicates that victim interests can be more suitably administered as a matter of victim's compensation than in the context of a sentencing hearing, which requires an objective assessment as to offence seriousness and offender culpability.⁴ In terms of this objective assessment, Hunt CJ at CL argues against the notion that the views of family victims not directly injured in the homicide may be able to contribute to the assessment of the offence without diminishing the principle of the universality of the value of human life.⁵ Harm, arguably, needs to be limited to the immediate circumstances of the death of the victim out of respect for this principle.

Issues of sentence construction notwithstanding, the NSWCCA has indicated that the *Previtera* rule may now need to be revisited in the context of s3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 3A(g) prescribes that a court may impose a sentence on an offender to recognise the harm done to the victim and the community. Considering this new section, Spigelman CJ indicates in *R v Berg* [2004] NSWCCA 300 at [43-44], that family impact statements may be able to influence sentence where the content of the statement may appropriately inform the court as to the harm done to the community.

This argument for reform was again addressed in *R v Tzanis* [2005] NSWCCA 274. In this instance, the NSWCCA was convened as a panel of five judges to determine the issue of the admissibility of family statements. Though declining to consider it on this occasion, the court did indicate the gravity of this issue by suggesting that 'no suitable

vehicle has emerged for the purposes of the grant of special leave by the High Court' (*R v Tzanis* [2005] NSWCCA 274 at [16]).

The States and Territories of Australia

The use of family statements as a source of objective evidence relevant to sentence emerges in the Victorian case of *R v Willis* [2000] VSC 297. In this instance, the Victorian Supreme Court suggests that victim impact statements may inform the sentencing process where evidence is presented that phrases the impacts of the offence on family members in the broader context of the offence. This broader context is significant to any sentencing court when considering the seriousness of the offence in an objective way. *Willis* indicates that this provides the means by which victim impact statements given by family members may be of some relevance to the sentencing court:

What they do is to introduce in a more specific way, factors to which a court would ordinarily have regard in a broader context. They constitute a reminder of what might be described as the human aspect of crime and draw to the attention of the judge who would of necessity have to consider the possible and probable consequences of criminal behaviour, not only its significance to society in general but the actual effect of a specific crime upon those who have been intimately affected by it. Victim impact statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the Court's attention the damage and senseless anguish which has been created and which can often be of very long duration. (*R v Willis* [2000] VSC 297 at [16])

Willis deals with questions as to the utility of victim impacts statements raised in *R v Penn* [1994] 19 MVR 367. *Penn*, a case involving culpable driving causing death, held that the extent that a sentencing court may consider evidence of the impact of the offence upon family members in the context of community sentiment may be limited. Due to the need interpret harm objectively, in terms of the community's reaction against the needless waste of life caused by motor accidents, the Victorian Court of Criminal Appeal ('VCCA') suggests that the specific consideration of the impact of an offence on family members may go beyond what may be considered an "objective" assessment.

R v Miller [1995] 2 VR 348 went on to reject *Penn* out of changes introduced by the *Sentencing (Victim Impact Statement) Act 1994* (Vic). This Act modified Victorian sentencing law to allow a sentencing court to consider the 'injury, loss or damage' that occurs as a result of an offence. This Act also amended the *Sentencing Act 1991* (Vic) s 5(2), directing a sentencing court to consider the impact of the offence together with changes in the personal circumstances of any victim, as a result of an offence. This includes family as well as primary victims. The VCCA in *Miller* also explained how the 1994 Act envisages the use of impact statements as a means by which evidence of harm may be established as relevant to sentence, while also emphasising how evidence of victim trauma, injury and loss not provided by impact statement may also continue to be material.

Miller rules that where impact evidence is consistent with community sentiment then it should be considered as reflecting that sentiment. Family statements may thus be particularly useful where they present information relevant to sentencing principles that require the court to specifically consider the community's attitude toward the

offence. Family impact evidence would therefore be relevant where there is a genuine need for general deterrence and denunciation. Despite these principles not being specifically at issue in *Miller*, the VCCA rules that family perspectives will continue to be generally relevant to the task of sentencing offenders:

We are not persuaded that the judge misdirected himself by referring to, and taking into account of, the effect on the Bendigo community of this crime, or the anguish of her family. Commonsense would allow inferences to be drawn in respect of these matters, in the absence of direct evidence. (*R v Miller* [1995] 2 VR 348 at 354)

Miller is authority for the proposition that offence seriousness and offender culpability may continue to be construed objectively despite the views of family victims. It would only be where a family statement is inconsistent with community sentiment that exclusion is warranted. Such statements may include those seeking a sentence based on vengeance or revenge, where the harm spoken of is unrelated to the offence, or where the forgiveness of the victim is entirely unjustified. *Miller* reiterates the point that family impact statements should not be seen as inherently prejudiced against the ends of sentencing but seen as potentially useful, especially where they are consistent with the community's attitude toward an offence.

International Decisions

The Canadian experience also indicates that family impact statements may be relevant to the determination of offence seriousness. Victim impact statements are admissible in sentencing proceedings under s 722 of the Canadian Criminal Code. Interpreting this provision, the Ontario Superior Court of Justice ruled in *R v Gabriel* (1999) 137 CCC (3d) 1 that, irrespective of the notion that no one life be valued above another, that courts include the views of family victims to show respect for their significance to and connection with the primary victim. Courts also need to show respect for the fact that family victims may also appropriately reflect community views and perspectives. It was noted that sentencing tends to focus on the offence and the offender, to the exclusion of the victim. In this way, most victims would be reduced to obscurity in legal proceedings dealing with their offence. For the Ontario Superior Court of Justice, victim impact statements thus provide a unique tool for the balancing of interests in the sentencing process:

The victim was a special and unique person as well - information revealing the individuality of the victim and the impact of the crime on the victim's survivors achieves a measure of balance in understanding the consequences of the crime in the context of the victim's personal circumstances, or those of survivors. (*R v Gabriel* (1999) 137 CCC (3d) 1 at 11-12)

Similar to Hunt CJ at CL in *Previtera*, the Ontario Superior Court of Justice also indicates that victim interests can be accommodated elsewhere, through victim's compensation and alternative assistance schemes. However, the court also emphasises that inclusion of family statements may allow for the balancing of the interests of justice, specifically including the victim where they would otherwise be excluded, to better inform the sentencing court of community attitudes and expectations following an offence.

Against the tenor of *Gabriel*, however, the Criminal Division of the Provincial Court of British Columbia has taken a more restrictive view of the utility of s 722 in *R v Readhead* (2001) BCPC 208. This court ruled that private perspectives ought not inform the sentencing process, which must be manifestly concerned with the public interest. It is for the sentencing judge to thus consider the harm occasioned to the victim, who must instead turn to civil for private redress. Despite taking this view, the sentencing judge does acknowledge the utility of victim impact statements tendered in homicide proceedings. His Honour recognised that:

What, then, is the purpose of a victim impact statement? First, the words of the victim of a crime might well serve to educate the offender as to the effects of his or her criminal behavior, with some potential rehabilitative effect. Second, victim impact statements may provide some sense of catharsis for victims, particularly those who choose not to pursue any form of redress in the parallel stream of the civil law. Third, the inclusion of victim impact statements in the materials presented during a sentencing hearing may serve to assure the public that sentencing judges, while bound to sentence in accordance with the principles discussed earlier, are always keenly aware of the unique and intensely personal response of each victim harmed by the criminal conduct of another. (*R v Readhead* (2001) BCPC 208 at [14]).

The ‘principles discussed earlier’ are those that seek to phrase the sentencing process as an independent one; an objective assessment of offence seriousness and offender culpability through the removed, independent assessment of the court. This, however, is entirely consistent with the principles outlined in *Gabriel*, which does not seek to introduce a private perspective into sentencing proceedings. Despite the impact statement being drafted by the victim personally, it is for the sentencing court to infer from the material presented the facts relevant to the determination of an objectively proportionate sentence. The later decision of *R v McDonough and McClatchey* (2006) CanLii 18369 in the Ontario Superior Court of Justice, despite also acknowledging the limited basis upon which a court may use impact statements tendered in homicide proceedings, nonetheless reiterates this point:

In explaining the harm done by and loss suffered as a result of the commission of an offence, it is often necessary to give a brief outline of the character of the victim or deceased, to explain the impact of the crime. As Hill J. expressed it, the judge learns of the “individuality of the victim”: *Gabriel* at para 19. (*R v McDonough and McClatchey* (2006) CanLii 18369 at [29])⁶

This is entirely consistent with the notion that it is for the court itself to construe sentence by *inter alia* reflecting of the harm occasioned to all victims relevant to the offence. This point was first emphasized in *R v DMP* [1999] AJ No1085. In this case the Alberta Court of Appeal explained:

... Parliament makes it clear that a victim impact statement is something which a sentencing judge *may and should consider, and (if appropriate and convincing) give significant weight*. This trial judge quoted almost all of this victim impact statement, and referred to Parliament’s directive. In our view, he did as Parliament told him to. What is more, he cited authority allowing him to take judicial notice of the likelihood of the same thing. (*R v DMP* [1999] AJ No 1085 at [15]) (emphasis added)

The reasoning supporting the Canadian decisions is similar in this respect to the ultimate finding of the United States Supreme Court in *Payne v Tennessee* (1991) 115 L Ed 2d 720. The issues raised in *Payne v Tennessee* were first addressed across two earlier decisions of the United States Supreme Court, namely *Booth v Maryland* (1987) 96 L Ed 2d 440 and *South Carolina v Gathers* (1989) 104 L Ed 2d 876. In

Booth v Maryland the court held that the Eighth Amendment to the United States Constitution estopped a sentencing jury in a capital trial from hearing victim impact evidence regarding the personal characteristics of the victim, which also included the extent to which family members were also traumatised by the death of the victim. *Booth v Maryland* was reasoned on the assumption that impact evidence limited the defendant's right to a fair trial, in that an impact statement was likely to inflame a jury against the defendant given the emotive nature of the content of a statement. *South Carolina v Gathers* extended this prohibition by limiting how the use of impact statement by the prosecutor. Again on the basis of the capacity for impact evidence to rouse the jury against a defendant, *South Carolina v Gathers* limited the prosecutor's ability to refer to the content of impact evidence when addressing the jury, particularly in terms of personal attributes of the victim that may not be material to liability. *Payne v Tennessee*, however, overruled these earlier decisions, holding that the Eighth Amendment does not prevent a jury from taking account of the personal characteristics of the victim in capital trials nor from a prosecutor arguing similar evidence during sentencing.

Payne v Tennessee made this change on the basis of the need for an expanded assessment of the harm of the offence, inclusive of the victim's perspective on the impacts occasioned by the original offence. The majority took the view that the harm caused to the victim has long been a concern of the criminal law. The court also noted the fact that trial judges experienced great difficulty excluding reference to the harm to the victim during sentencing in accordance with the two earlier decisions. Prosecutors would often refer to the impacts of the offence on the victim, or their family, and in so doing risk the sentence being overturned on appeal. Victim impact statements are, in the view of the majority in *Payne v Tennessee*, another means by which a court may be informed of the relevant harm occasioned to the victim. The court ruled impact statements tender information long considered by a court when making a sentencing decision. As such, the United States Supreme Court advocates an inclusive view towards the victim.

In England and Wales, all persons injured or traumatised by a criminal incident have the ability to make a "victim personal statement", equivalent to a victim impact statement tendered in other jurisdictions. A victim personal statement forms part of the case file to be distributed to all parties in a matter, including the prosecution, defence and the court, and can be made in addition to any statement given to the police. Personal statements may be used by the court during sentencing. Under these conditions, courts are able to use victim personal statements when considering the objective seriousness of the harm resulting from an incident. Significantly, such statements may be used by the court with regard to those harms occasioned by both primary and family victims. Concern over the use of victim perspectives in the sentencing process in England and Wales developed as a result of some victims proposing particular sentencing terms in their statements. With limited exceptions,⁷ the commonly agreed role of an impact statement enables victims to indicate, in their own words, the impacts of the offence upon them. The determination of the appropriate sentence ought to be left for the judge. It is taken to be generally unacceptable for a victim to specify a particular sentence, such as length of a term of imprisonment, or custodial or non-custodial term. In the event of such a recommendation, the entire statement, or part of it, may be disregarded. However, against the trend of dismissing particular sentencing recommendations, some ground

has been gained allowing for a more inclusive perspective where, under certain limited conditions, the consequences of a sentence on the actual victim will be considered relevant to the court. As indicated by cases that have come for review before the Court of Appeal of England and Wales, this is true even for family victims.

In *R v Perks* [2001] 1 Cr App R (S) 19 the defendant was convicted of robbery and sentenced to four years' imprisonment. During the trial, the husband of the victim, addressed a letter to the Crown Prosecution Service indicated the devastating physical and mental impact of the attack on his wife. In the letter, he expressed his anger toward the offender, indicating that the offender should be imprisoned so that an example could be made of him. The letter was placed in the case file thus making it available to be read by any party, as well as the judge. The ground of appeal was that the sentence was manifestly excessive on the basis that the judge took this letter into account in sentence. Allowing the appeal, Garland J of the Court of Appeal states:

The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. ii) Where the victim's forgiveness or unwillingness to press charges provide evidence that his or her psychological or mental suffering must be very much less than would normally be the case.

The significance of *Perks* goes toward whether a particular sentence will aggravate the harm occasioned to a victim. Where the offender and victim are in a pre-existing relationship, a court may reduce the term of the sentence to diminish the impact of the sentence on the victim. This consideration will generally arise where the defendant and victim are somehow dependant on each other, either financially or emotionally or both. This consideration will most likely come to bear on the judge where the court is considering a lengthy term of imprisonment, or imprisonment for an offence for which a suspended or non-custodial sentence may suffice. *Perks* has set the pace for further decisions where minimal terms have been requested on the basis of some negative effect being reported by the victim. In *R v Nunn* [1996] 2 Cr App R (S) 136, the appellant was charged with causing death by dangerous driving, following the loss of control of his car, resulting in the death of one of his passengers. Following a guilty plea, the family of the deceased presented the Court of Appeal with victim statements indicating that the original term imposed on the defendant made it difficult for them to recover from the trauma they had experienced. The family suggested that the defendant, by way of his conviction and the loss of his passenger, had suffered enough. In sentencing the defendant, Judge J held that the victim's opinions were irrelevant. His honour then indicated that in the present matter, that the impact of the sentence on the victims was indeed relevant, albeit in limited circumstances:

...the Court is concerned not with the judgment of the deceased's mother and sister about the level of sentence imposed on the applicant, but with the clear evidence, which we accept, that by its very length the sentence on [the victim's] friend is adding to the grief and anxiety which they are suffering ... When the mother and sister of the deceased and the rest of the family have already suffered so much, we do not think that these adverse consequences of this particular sentence should be disregarded. In mercy to them we shall reduce the sentence as far as we can, consistent with our continuing public duty to impose appropriate sentences for those who cause death by driving dangerously under the influence of drink ... (*R v Nunn* [1996] 2 Cr App R (S) 136 at 140-141)

Perks and *Nunn* stand as authority for the passing of a lesser term of imprisonment where family victim present evidence that the actual sentence imposed is aggravating the trauma they are experiencing as a result of the original offence. *Nunn*, however, proposes that any reduction of sentence be construed objectively. Importantly, the court emphasises that any reduction not be informed by the victims themselves. Rather, it is for the sentencing judge to construe the aggravated harm caused to family members, as connected to the original offence, by examining evidence of the impacts of the sentence on each of the victims. However, *R v Mills* [1998] 2 Cr App R (S) 252, the court viewed evidence of aggravated harm as presented by the victim with greater enthusiasm. In this matter, the court looked favourably upon evidence of an improving relationship between the defendant and victim following the complaint of an attempted rape by a former partner of the victim. Judge LJ held, reducing the original sentence from six to three years imprisonment, that:

We have considered the evidence of the victim with great care. We have reflected on all the circumstances of this somewhat unusual case. As a matter of principle, the victim of a crime cannot tell the court that because he or she has forgiven the perpetrator the court should treat the crime, in effect, as if it had not happened. This was a serious offence. Attempted rape is always a matter of general public concern, in addition to its more immediate concern to the victim. It is clear that the victim in this case has chosen to forgive the perpetrator of the crime, and has said so in terms, perfectly genuinely. That cannot decide the appropriate level of sentence, but we take her evidence into account as indicating the current extent of the impact of this particular crime on the victim. Having considered the matter in the light of the information before us, we have come to the conclusion that the sentence ... was too long. (*R v Mills* [1998] 2 Cr App R (S) 252 at 254)

Mills can be distinguished from *Nunn* on the basis of the way in which the court comes to reduce each sentence, taking into account the impacts a lengthier sentence would have on each of the victims. Compared to *Nunn*, *Mills* indicates that a court may be more inclined to take the victim's perspective into account, through evidence presented by the victim themselves. In *Mills*, the court is clearly considering testimony from the victim personally. This evidence, however, is still scrutinised by the court in order to determine its objectivity, and it is held that such evidence cannot determine sentence alone. However, in doing so, the court moves toward a more inclusive, restorative approach, that makes room for the perspective of the victim by allowing for the impacts of the sentence on the victim, as presented by the victim themselves (Edwards, 2002: 694).

RECONCEPTUALISING THE CRIMINAL TRIAL IN LAW AND JUSTICE

If we can argue for a notion of the emergence of the 'new criminal trial' is not to argue that the trial is taking some essential new form. Rather, it may be more appropriate to argue for a new conceptualisation of the trial that repositions the trial as an open, inclusive institution which responds to the changing needs of society, despite being bound by general rules and principles that protect certain rights as a priority. Duff et al. (2007) articulate the need to defend the trial against various changes in order to argue against redefining the modern trial away from the dominant model of that emerged into the twentieth century. This trial, the adversarial trial, seeks to secure defendant rights to the exclusion of other interests through a communicative process that allows the defendant to call into question accusations made against him or her.

The argument that the modification of key rights, many of which have not been canvassed in this paper, are being risked for the modification of the law to allow for the consideration of interest peripheral to the trial is a significant one. The trial stands as an institution that secures some very important rights, one of which is to test the prosecution case against the accused in light of evidence that meets a certain standard of legitimacy. Whether the modification of defendant rights and trial process, however, risks the communicative process through which defendants secure justice against a criminal accusation is questionable. As can be seen through the modification of the early trial process away from ordeal to the presenting jury, the victim remains a vital agent of justice constitutive of the trial experience. For the greater part of English and even Australian history, the victim was the prosecutor. This in itself does not prove that the victim is no risk to the communicative process at stake in the recent debate over the use of victim impact statements in homicide proceedings, but it does show that we should not consider victim interests as peripheral or sectarian to the exclusive status of defendant rights. Furthermore, we should not allow the exclusivity of the defendant to characterise a forum that has traditionally been open to various parties and interests over time. Although forming the basis of this paper, these interests need not be contained to the development of victim rights. Though not exhaustive, such modifications include the introduction of limited defendant rights in the investigation of public disorder or terrorist offences; the modification of the law against retrial otherwise known as double jeopardy; the movement from unanimous to majority jury verdicts; the movement away from jury trials to judge alone trials; the increasing emphasis on technocratic justice characterised by the popularity of summary hearings in local or magistrates' courts; and the revival of habitual offenders legislation, specifically for recidivist sexual offenders, in addition to their registration following release from prison.

The ways in which defendant rights have been modified, in rephrasing the context of the trial as the means through which defendant rights were seen to be mediated, has clearly evolved to meet new needs. These new needs involve rights and interests other than those of the defendant, including the broader concerns of society in the management of significant threats to public safety, such as terrorism, or law and order politics. These needs also include, however, the once identified sectarian interests of victims of crime. The trial as the tribunal through which defendant rights were determined and finalised has now evolved beyond the original hearing or trial such that defendant rights may be determined continuously, outside of the trial itself, or by interests and perspectives traditionally held as beyond the scope of relevance in the determination of criminal liability or in formulating a proportionate sentence. As can be demonstrated through a brief history of the trial, the criminal trial never took any particular form. Rather, it always responded to new needs as they emerged over time. This argues against the notion that a 'new' trial is emerging, but rather that we need a new conceptualisation of the criminal trial that constituted it in history and discourse.

Duff et al. (2007: 6) acknowledge that there has been a lack of a general normative theory of the trial given that legal scholars have traditionally theorised particular parts of the trial, such as the relevance of procedure, the role of evidence, or even of counsel, rather than advance a theory which seeks to proscribe the format of the entire criminal trial itself. This, perhaps, reflects the way that the trial is a combination of various substantive and procedural rules that, when taken together, sum up the liability of the defendant. Importantly, this fragmented development, indicated

through a vast literature detailing the history and development of the trial and its constitutive rules and processes, tells a different story than that advanced by Duff et al. (2007). Rather than advocate the trial in any particular form, the trial may better be seen as an adaptive institution that includes change rather than excludes change. This, despite its changing forms including summary hearing and trial by indictment, explains the longevity of the criminal trial as the principal means by which we determine liability for serious wrongdoing. Further, an inclusive model that accounts for social and political change allows for a more adaptive trial process that provides for the participation of parties deemed relevant to the determination of liability or offence seriousness. Not that such inclusions may be without controversy, but a trial model that is exclusive to the interests of certain agents makes for a process that adheres to particular needs that may well respond to limited needs in time. This may well be true of the needs of defendants, which have not always been fairly included in a trial process secured by law. The overriding issue should be the development of a criminal trial experience that is founded on principles of openness, transparency and fairness to all parties that experience consequences as part of the criminal incident, even family members of homicide victims, who have traditionally been deemed peripheral to actual accounts of harm occasioned. As the Australian and international cases demonstrate, this view is only acceptable where we make particular assumptions about nature of harm as relevant to a particular trial experience that privileges defendants, and where the victim's perspective may well be repugnant to such rights.

Notes

¹ BA (Hons) LLB (Hons) GradDipLegPrac PhD. Solicitor and Barrister (NSW).

² The *Victim Rights Act 1996* (NSW) inserted the current provisions concerning victim impact statements into the *Criminal Procedure Act 1986* (NSW) Pt 6A (ss 23A-23E). These sections were later transferred to the *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 3 Div 2.

³ Primary victims include persons or witnesses to an offence that have suffered personal injury as a result of an offence. Family victims include members of the primary victim's immediate family. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

⁴ Also see recommendation 3 of the New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996). Hunt J advocates the treatment of family impact statements in homicide cases along similar lines to those proposed by the NSWLRC.

⁵ The one exception recognised by Hunt CJ at CL may be where the primary victim dies a slow, lingering death. The circumstances of the offence would thus come to encompass family victims, who may come to care for the primary victim before death. See *R v Previtera* (1997) 94 A Crim R 76, 86.

⁶ As to a case in point regarding the relevance of victim impact statements in the sentencing of homicide offenders, see *R v Hayden* (2001) CanLII 13694 at [8-14].

⁷ See *Sentencing Act* (NT) s 106B(5A).

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